

Claiming Privilege Against Self-Incrimination During Cross-Examination

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Introduction

At a general court-martial before a military judge alone, Specialist (SPC) John Doe pled not guilty to wrongful distribution of a controlled substance. Defense counsel (DC) called SPC Joe Snuffy as an alibi witness. Specialist Snuffy testified that SPC Doe was with him on the date and time in question and that they certainly did not engage in any illegal activity such as wrongful distribution of a controlled substance during the relevant period. During the cross-examination, after answering numerous questions concerning his activities with SPC Doe, the following colloquy took place between SPC Snuffy and the trial counsel (TC):

TC: Now SPC Snuffy, you've sexually assaulted another Soldier, haven't you?

SPC Snuffy: I'll stand on my Article 31 rights in response to that question.

TC: Let me ask you in a different way. When interviewed by Criminal Investigation Division (CID), you were lying when you told CID that you didn't commit the sexual assault, weren't you?

SPC Snuffy: I'll stand on my Article 31 rights and I'm not talking anymore. [Simultaneously with his refusal, DC stood up and said the following:]

DC: Your honor, I object. This line of questioning is completely irrelevant.

TC: Your honor, credibility of the witness is absolutely relevant.

Specialist Snuffy has not been granted any immunity for his testimony at SPC Doe's court-martial and the Army's Criminal Investigation Command is still investigating a recent sexual assault in the barracks where SPC Snuffy is the prime suspect. Specialist Doe is not suspected of any involvement in the sexual assault.

While it is not often that a witness will assert his privilege against self-incrimination when called to testify at a court-martial, much less assert that privilege only during cross-examination, it can happen. Using the above scenario, this article will look at how the various rules work when a

witness asserts his privilege against self-incrimination during cross-examination, the effects of that assertion, and usually the more difficult determination—the appropriate remedy.³

May the Witness Assert the Privilege?

The first question to ask is whether the witness, SPC Snuffy, may assert his privilege against self-incrimination. Military Rule of Evidence (MRE) 301(c) states that:

If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.⁴

The military judge, not the witness or panel members, decides whether the witness may properly invoke.⁵ Here,

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³ While the scenario in this article is written with Specialist Snuffy as a defense witness, the same analysis would apply if the witness is a government witness who asserted his privilege during cross-examination by the defense. *See* United States v. Moore, 36 M.J. 329, 334 (C.M.A. 1993) (stating that Military Rule of Evidence (MRE) 301(f) applies whether it is the accused or the prosecution that is deprived of cross-examination on a non-collateral subject); *see also* United States v. Richardson, 15 M.J. 41, 45 (C.M.A. 1983) (quoting United States v. Nixon, 418 U.S. 683, 709 (1974) (“The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.”)).

⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 301(c) (2012) [hereinafter MCM].

⁵ *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (declaring that a witness' say-so does not justify the silence; it is a question for the court to determine).

answers to whether SPC Snuffy has sexually assaulted another Soldier and whether he has lied to CID could tend to incriminate him. Therefore, SPC Snuffy may properly assert his privilege against self-incrimination, as he has not been granted any immunity for his testimony in court, there is no running of the statute of limitations, and he definitely can be subject to criminal penalty based on his answers.

When Should the Witness Assert the Privilege?

In the above scenario, if it is a court-martial before members and the TC knew before SPC Snuffy took the witness stand that SPC Snuffy would assert his privilege against self-incrimination in response to any question about his involvement in the barracks sexual assault, may the TC question SPC Snuffy about his involvement in the barracks sexual assault before the members? No. Neither the government nor the defense may call or question a witness before members knowing that the witness will assert a claim of privilege.⁶ “[I]t is equally unprofessional for either to call a witness he or she knows will assert a claim of privilege in order to encourage the jury to draw inferences from the fact that the witness claims a privilege.”⁷ If there is a concern that a witness may assert his privilege against self-incrimination upon questioning, the matter should be resolved outside the presence of members regardless of whether counsel believe it is a valid assertion of privilege.⁸ Thus, if the TC knew ahead of time that SPC Snuffy will assert his privilege against self-incrimination when questioned about his involvement in the barracks sexual assault, the TC should raise the issue at an Article 39(a) session rather than before members.

Effect of Asserting Privilege—Drawing Adverse Inference?

Since SPC Snuffy may properly assert his privilege against self-incrimination, may the TC then argue that the fact finder draw an adverse inference from that assertion? No. Pursuant to MRE 301(f)(1), “[t]he fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.”⁹

⁶ Moore, 36 M.J. at 332 n.4.

⁷ *Id.* (quoting commentary to Standard 4-7.6(c), in AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION 4.94 (2d ed. 1979)); AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 225 (3d. ed. 1993) (maintaining the same standard in this current edition).

⁸ Moore, 36 M.J. at 332 n.4.

⁹ MCM, *supra* note 2, MIL. R. EVID. 301(f)(1).

As an alternative, may the TC argue that the fact finder draw an adverse inference based on “the interests of justice,” citing MRE 512(a)(2)?¹⁰ The answer is also no. When a witness asserts his privilege against self-incrimination while testifying, MRE 301(f), not MRE 512(a)(2), applies.¹¹

Remedy

Since SPC Snuffy appropriately asserted his privilege against self-incrimination and no adverse inference can be drawn from that assertion, what is the TC to do? Military Rule of Evidence 301(f)(2) states that “[i]f a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.”¹² Before asking the military judge to strike the direct testimony of the witness, whether in whole or in part, the TC should consider the following:¹³ (1) whether the attempted impeachment of the witness was in proper form; (2) whether the attempted impeachment of the witness was “collateral”; and (3) whether counsel can eliminate or limit the basis for the witness’s refusal to testify.

Was the Attempted Impeachment of the Witness in Proper Form?

Before asking the military judge to strike SPC Snuffy’s direct testimony, whether in whole or in part, the TC should consider whether the attempted impeachment was in proper form. Trial counsel was correct that the witness’s credibility is relevant and a proper area for impeachment. Evidentiary

¹⁰ *Id.* MIL. R. EVID. 512(a)(2) (“The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn there from except when determined by the military judge to be required by the interests of justice.”).

¹¹ See *United States v. Matthews*, 66 M.J. 645, 649, 651 (A. Ct. Crim. App. 2008) (stating that since MRE 301(f) is the specific statute on point, it is controlling, even though MRE 512 provides general guidance regarding constitutional privileges of witnesses), *rev’d on other grounds*, 68 M.J. 29 (2009).

¹² MCM, *supra* note 2, MIL. R. EVID. 301(f)(2). The same analysis would apply in a situation where a witness was unwilling to answer a question, but did not claim a privilege. See *United States v. Longstreath*, 45 M.J. 366, 374 (1996) (reasoning that the fundamental issue is still whether striking all or part of the testimony is necessary to preserve an accused’s right of confrontation).

¹³ This is not an exhaustive list. Other pertinent considerations may be the party’s theory of the case and how the attempted impeachment fits into the party’s theory of the case as a whole. Counsel should always keep in mind that just because something can be done does not necessarily mean that it should be done.

rules, however, continue to apply even when testing the credibility of witnesses.¹⁴

In the above scenario, asking SPC Snuffy whether he has sexually assaulted another Soldier was an improper form of cross-examination. Under MRE 404(a)(3), character evidence of a witness may be admissible as provided in MREs 607–609.¹⁵ Military Rule of Evidence 607 allows the TC to attack SPC Snuffy’s credibility.¹⁶ Military Rule of Evidence 608, however, limits the methods by which a witness’ character, conduct, and bias may be attacked.¹⁷ While the TC may attack the credibility of SPC Snuffy using a specific instance of conduct during cross-examination, under MRE 608(b), those specific instances of conduct must be “probative of truthfulness or untruthfulness” Sexual assault by itself is not probative of truthfulness or untruthfulness. Unless the TC can articulate how the alleged sexual assault is evidence of bias, prejudice, or motive to misrepresent under MRE 608(c), such a cross-examination question would be inappropriate.¹⁸

Asking the witness whether he has lied to CID in the past is, however, a specific instance of conduct “probative of truthfulness or untruthfulness” and is therefore proper as a cross-examination question under MRE 608(b).¹⁹ However, as mentioned above, that is only the first part of a three-part inquiry.

*Was the Attempted Impeachment of the Witness
“Collateral?”*

In addition to being in a proper form under the MRE, questions to impeach a witness cannot be on a matter that is “collateral.” Military Rule of Evidence 301(f)(2) allows a party to ask the military judge to “strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are *purely collateral*.”²⁰ “Collateral” is defined as “evidence of minimal importance” and “[a] matter is collateral when sheltering it would create

little danger of prejudice to the accused.”²¹ Credibility of the witness is generally not deemed collateral.²² As with most general propositions, there are exceptions.

Courts have drawn a distinction between cross-examinations aimed at attacking a witness’s general credibility versus those aimed at the specific facts of the charged offense. Noting the “ample civilian and military precedent,” the Court of Military Appeals (CMA) in *United States v. Richardson* concluded that there are limitations on striking a witness’s direct testimony when the cross-examination concerns a witness’s prior misconduct that has no connection to the charged offense.²³ In *Richardson*, upon the TC’s motion, the military judge struck a witness’s entire direct testimony when the witness asserted his privilege against self-incrimination after the TC attempted to cross-examine him about drug activities unrelated to the charged offenses.²⁴ The CMA found that the military judge erred because the TC’s questions about the witness’s involvement in unrelated drug dealings, asked to attack his general credibility, were “purely collateral.”²⁵

Unlike questions designed to probe a witness’s general credibility, courts view questions that go to the facts of the case at hand differently. In *United States v. Shatteen*, the military judge struck a defense witness’s direct testimony after he asserted his privilege against self-incrimination during cross-examination.²⁶ The accused was charged with, among other offenses, wrongful use of marijuana.²⁷ The witness testified during direct examination that on the night in question, all personnel involved were smoking a Black and Mild cigar, as opposed to a marijuana cigarette.²⁸ When TC questioned him about his familiarity with a “blunt” that is a cigar versus a “blunt” that is a hollowed-out cigar

¹⁴ See, e.g., MCM, *supra* note 2, MIL. R. EVID. 404(a)(3) and 607–609.

¹⁵ *Id.* MIL. R. EVID. 404(a)(3).

¹⁶ *Id.* MIL. R. EVID. 607 (“The credibility of a witness may be attacked by any party, including the party calling the witness.”).

¹⁷ *Id.* MIL. R. EVID. 608(a) (providing opinion and reputation evidence of truthfulness or untruthfulness); *id.* MIL. R. EVID. 608(b) (providing specific instances of conduct probative of truthfulness or untruthfulness).

¹⁸ *Id.* MIL. R. EVID. 608(c) (“Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.”).

¹⁹ Although a proper question under MRE 608(b), the trial counsel is stuck with the answer; no extrinsic evidence is allowed. *Id.*

²⁰ *Id.* MIL. R. EVID. 301(f)(2) (emphasis added).

²¹ *Id.* MIL. R. EVID. 301(f)(2) analysis, at A22-6; see also *United States v. Richardson*, 15 M.J. 41, 47 (C.M.A. 1983) (distinguishing collateral matters from “invocation of the right in connection with questions dealing with ‘the details of [the witness] direct testimony’”) (citing *United States v. Colon-Atienza*, 47 C.M.R. 336, 337 (C.M.A. 1974)).

²² See *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977) (stating that cross-examination may touch areas of self-incrimination if it is related to the direct examination or to the witness’s credibility); *United States v. Matthews*, 66 M.J. 645, 649 (A. Ct. Crim. App. 2008) (stating credibility issues are key concerns of the truth seeking process).

²³ *Richardson*, 15 M.J. at 47 (citing, *inter alia*, *Dunbar v. Harris*, 612 F.2d 690 (2d Cir. 1979); *United States v. LaRiche*, 549 F.2d 1088 (6th Cir. 1977); *United States v. Phaneuf*, 10 M.J. 831 (A.C.M.R. 1981); *United States v. Terrell*, 4 M.J. 720 (A.F.C.M.R. 1977)).

²⁴ *Id.* at 43–44.

²⁵ *Id.* at 47.

²⁶ *United States v. Shatteen*, No. ACM S29721, 2001 WL 1163635, at *2 (A.F. Ct. Crim. App. Sept. 14, 2001), *aff’d*, 58 M.J. 22 (2002).

²⁷ *Id.* at *1.

²⁸ *Id.* at *2.

containing marijuana and about his personal use of marijuana on numerous occasions that presumably would have led to that familiarity, the defense objected and requested that the witness be advised of his right against self-incrimination.²⁹ Upon being warned, the witness asserted his privilege against self-incrimination and refused to give further testimony, resulting in his entire testimony being struck.³⁰ The Air Force Court of Criminal Appeals affirmed the military judge's decision, noting that while the judge resorted to the most extreme remedy available, defense failed to put forth any evidence that the matters to which the witness refused to testify were purely collateral.³¹

Thus, in determining what is collateral and what, if any, testimony to strike, the military judge has discretion and is encouraged not to resort to the most extreme remedy.³² In *United States v. Moore*, the CMA held that the military judge should not have struck *all* of the witness's testimony when she asserted her privilege against self-incrimination.³³ The CMA emphasized that MRE 301(f)(2) only empowers a military judge to strike testimony as appropriate; it is not a requirement.³⁴ "In other words, the rule anticipates that a military judge to whom such a motion to strike is made will approach a ruling with some sensitivity to determining what if any remedy is necessary to achieve fairness and justice through the adversary system."³⁵ The CMA noted that the purpose of TC's intended cross-examination was unclear, and that if it was only to undermine the witness's credibility in a general way as a lawbreaker, it would be collateral.³⁶ In any event, the CMA concluded that the military judge should have been more precise in his exclusion of the witness's direct examination.³⁷

In SPC Snuffy's scenario, TC's attempt to impeach SPC Snuffy regarding the sexual assault was improper under the MRE. The military judge should therefore not strike the direct testimony as a result of his first invocation. As to SPC Snuffy's second invocation, did the TC properly cross-examine SPC Snuffy by questioning him about lying to CID? As with *Richardson*, such attempt to impeach SPC Snuffy's credibility by asking him whether he lied to CID about a wholly separate event from the ones at issue in trial may be deemed collateral.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at *3.

³² *United States v. Longstreath*, 45 M.J. 366, 374 (1996).

³³ *United States v. Moore*, 36 M.J. 329, 335–36 (C.M.A. 1993).

³⁴ *Id.* at 334.

³⁵ *Id.*

³⁶ *Id.* at 335.

³⁷ *Id.* at 335–36.

Specialist Snuffy fully answered the TC's questions about the details of his direct examination. Given that SPC Snuffy's statement to CID about the sexual assault is wholly unrelated to the charges at trial—wrongful distribution of a controlled substance—or his direct testimony, it may be evidence of minimal importance in connection with the facts at hand. As the CMA noted, if every refusal to answer a question on cross-examination on grounds of self-incrimination results in striking the witness's direct testimony, a cross-examiner may be encouraged to harass the witness into asserting privilege in order to have the witness's direct testimony struck.³⁸

Now assume that in the above scenario, instead of asking SPC Snuffy about his involvement in the barracks sexual assault, TC had attempted to impeach SPC Snuffy about his involvement in the wrongful drug distribution as a drug supplier to several Soldiers in the unit, to include SPC Doe. In this instance, should SPC Snuffy assert his privilege against self-incrimination, TC would have been well within the limits of MRE 301(f)(2) and case law to ask the military judge to strike SPC Snuffy's entire direct testimony. Specialist Snuffy's role as the drug supplier in the charged offense is not collateral as it goes directly to the facts of the case at hand, and it also supplies a motive for him to provide SPC Doe with an alibi. In the alternative, TC, at a minimum, can ask the military judge to strike portions of SPC Snuffy's testimony that relates to the alibi defense.

Could Counsel Eliminate or Limit the Basis for the Witness's Refusal to Testify?

Striking a witness's entire direct testimony is a drastic remedy. Before asking the military judge to grant such remedy, counsel should be prepared to justify their request, consider other alternatives, and distinguish the facts of their case as necessary. For example, the CMA has noted that striking a defense witness's direct testimony would be an especially harsh remedy when the government could grant immunity and eliminate the basis for the witness's refusal to answer.³⁹ Counsel should also consider if the point they are attempting to get across can be or has been presented through another witness's testimony. If it is cumulative to what has already been presented, or if there is an alternative

³⁸ *United States v. Richardson*, 15 M.J. 41, 47 (C.M.A. 1983).

³⁹ *Id.* at n.4. The Government also holds the immunity key to another door when a Government witness invokes. *United States v. Dill*, 24 M.J. 386, 389 (C.M.A. 1987) (quoting *United States v. Valente*, 17 M.J. 1087, 1088–89 (A.F.C.M.R. 1984) (“[A] prosecution witness is not ‘unavailable’ under [MIL. R. EVID.] 804(a)(1) even though he asserts his privilege against self-incrimination if he can be made available through the granting of testimonial immunity . . . The prosecution has an option; it can either do without the evidence or it can introduce appropriate hearsay statements of an absent witness; however, if the absence can be cured by testimonial immunity, such immunity must be granted. The confrontation clause of the U.S. Constitution requires nothing less.”)).

method to get the same facts to the fact finder, a military judge is less likely to grant the drastic remedy of striking a witness's entire direct testimony.

Moreover, courts have held that the privilege against self-incrimination is determined one question at a time.⁴⁰ Military Rule of Evidence 301(f)(2) also allows the military judge to strike a witness's direct testimony in part.⁴¹ Therefore, counsel should consider starting with questions the answers to which will not incriminate the witness. If the witness later asserts his privilege against self-incrimination, counsel can then ask for the less drastic remedy of striking a witness's testimony in part. Counsel should not automatically ask the military judge to grant the most drastic remedy just because the witness did not testify the way counsel wanted the witness to testify. For instance, in the scenario presented above, SPC Snuffy fully answered TC's questions concerning his activities with SPC Doe during the relevant period. Given that military judges are encouraged not to resort to the most extreme remedy, counsel should carefully examine what non-incriminating testimony can be properly elicited from the witness first.

Conclusion

While it can happen, it should be rare that counsel cannot anticipate that a witness will assert his privilege against self-incrimination. Therefore, the next time a witness tells you that he is asserting his privilege against self-incrimination and that he is not talking anymore, go through the steps set out above. First, has the witness appropriately asserted the privilege against self-

incrimination? Knowing that you cannot ask for an adverse inference to be drawn based on the assertion, consider other alternatives. Have you asked the right question? Is there another way of asking the question? What is the subject matter that you want to get into with the witness? Does it relate to the details of what the witness has testified to on direct? Does it relate to prior misconduct that has no relation to the charged offenses or what the witness has testified to? Have you considered granting the witness testimonial privilege if you are the government? Is the information you want already before the factfinder or can it be elicited from another witness? If you have thought through the above questions ahead of time, you will be well-prepared to argue your desired course of action before the military judge.

⁴⁰ See, e.g., *United States v. Mares*, 402 F.3d 511, 514 (5th Cir. 2005) (stating that the trial court is responsible for determining what the boundaries of the privilege are in relation to the testimony sought by the defendant); *Johnson v. United States*, 746 A.2d 349, 355 (D.C. 2000) (stating that a witness' privilege against self-incrimination can only be asserted against those specific questions to which his answers would incriminate him).

⁴¹ MCM, *supra* note 2, MIL. R. EVID. 301(f)(2).